

ARIZONA SUPREME COURT
Committee on the Impact of Wireless Mobile Technologies and Social Media
on Court Proceedings

Minutes
April 8, 2013

Members present:

Hon. Robert Brutinel, Chair
Hon. Dan Dodge
Hon. Margaret Downie
Hon. Michael Jeanes,
by his proxy Chris Kelly
Hon. Eric Jeffery
Karen Arra
David Bodney
Robert Lawless
Marla Randall
George Riemer

Members present by WebEx:

Hon. James Conlogue
Joe Kanefield
Robin Phillips
Kathy Pollard

Staff:

Mark Meltzer
Ashley Dammen
Julie Graber

Members not present:

Hon. Janet Barton
Hon. Scott Rash

Guests:

Paul Julien

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1. Call to Order; approval of meeting minutes: The Chair called the meeting to order at 10:05 a.m. The Chair noted that today's meeting follows the conclusion of the first of two public comment periods for R-13-0012 and R-13-0013, the Wireless Committee's rule petitions concerning Supreme Court Rules 122 and 122.1. The Chair reported that the State Bar filed one formal comment during the initial comment period in each of these rule petitions; these were the only formal comments. Staff has prepared revised rules after a review and analysis of these comments, and in addition, staff has suggested other changes to the draft rules.

Before proceeding to discuss the comments, the Chair asked the members to review the draft minutes of the November 7, 2012 meeting.

Motion: A member made a motion to approve the November 7, 2012 minutes. The motion received a second and it passed unanimously. **Wireless 13-001**

2. Discussion of the comments and rule revisions: The Chair requested staff to summarize the comments and newly proposed rule revisions. Staff first discussed revisions that were common to both Rule 122 and Rule 122.1. These revisions included modifications of the rule titles and section titles; the addition of subsection titles; and modifications to the introductory provisions in sections (a) of both rules. Staff characterized these two rules as complementary, and they now include similar titles, parallel organization and formatting, and cross-references in each rule to the other, especially with regard to definitions.

Rule 122(b) and Rule 122(i): Staff reviewed changes to the definitions in these rules, and noted a revised definition of the word “judge” in Rule 122(b) that allowed the deletion of any reference to “presiding judge” as well as the deletion of former section (p) concerning appellate courts. The members discussed the application of the new definition of “judge” to Rule 122(i), and the process by which a person would request permission to use a camera in a courtroom that was not in session. In a written comment, Judge Barton had urged that a person should submit these requests to the presiding judge, not to the judge who presides in a specific courtroom. She believes that a new judge might not appreciate the implications of granting the request, and might inadvertently allow inappropriate use of a camera in a courtroom that was not in session, for example, as a set for filming a television commercial. One member also noted that the request to film in a courtroom might not always be the same courtroom where a proceeding is taking place. Administration of these requests should therefore occur in a centralized location. Ms. Arra observed that people usually submit requests in Maricopa County to the court’s public information office rather than to the judge in whose courtroom a proceeding takes place. Accordingly, the members revised the last sentence of Rule 122(i) concerning use of a recording device while court is not in session as follows:

If a person wishes to use a recording device in any courtroom when that judge’s courtroom is not in session, prior to using the device, the person must obtain the express permission of the presiding judge of that jurisdiction or an ~~authorized~~ office of the court authorized by the presiding judge to approve requests under this section prior to use.

The members discussed but did not include references in section (i) to the Chief Judge of the Court of Appeals or to the Chief Justice of the Supreme Court.

The members also discussed the new definitions of “courtroom” and “victim” in Rule 122(b), as well as the other definitions in section (b), without making changes to those definitions.

Rule 122(c): A member requested clarification of the waiver provision in subsection (4) to address cases in which there are multiple requests for coverage. The members concurred that this provision would be just as effective with less language. The members then agreed to the following changes to the draft:

(4) *Time for a party to object to a request:* A party’s objection to a request for coverage of a proceeding is waived if the party does not object to the request in writing or on the record no later than the start of the proceeding, ~~or the conclusion of a hearing held under section (c)(3), whichever occurs first.~~

The discussion turned to subsection (c)(5). Members felt that requiring someone to give notification of coverage to a victim or witness “prior to the proceeding” was ambiguous. They also believed that the notification required by this provision should include the right to object. The members therefore agreed to these changes:

(5) *Time for a victim or witness to object to a request:* A victim or a witness may object to coverage at any time. An attorney who represents a victim, and anyone who calls a witness to testify, has a responsibility to notify that victim or witness of coverage, and his or her right to object, prior to the victim's appearance or the witness' testimony at the proceeding.

There was consensus among the members that the provisions of subsection (5) did not establish substantive rights, for example, that a witness could not refrain from testifying if he or she had not received the notification. However, the members felt that stating this in the rule was unnecessary.

Rule 122(d): The members engaged in an extensive discussion of section (d). The first sentence of the draft stated that a request for coverage that was properly submitted “will presumptively be approved....” One member felt that this was an appropriate provision, because courts operate on this presumption as a practical matter and the provision merely codifies existing practice. Other members noted that a presumption has legal meaning, and inclusion of a presumption would require additional text to explain how someone could overcome the presumption. Moreover, the members agreed that the first sentence of this section could have the same meaning with the following change, which the members adopted:

A properly submitted request for coverage ~~that is properly submitted under section (e) will presumptively~~ should generally be approved, but a judge may deny or may limit the request as provided in this section.

The members also concurred that subsection (d)(1) should explicitly state that a judge may deny a request for coverage sua sponte. To avoid the use of Latin terms, the members agreed to the following language:

(1) *Denial of coverage:* A judge on his or her own motion may deny a request for coverage, or may sustain a party's objection to coverage, only after making specific, on-the-record findings...[etc.]

In subsection (d)(2)(C), the members again felt that in addition to granting a request by a witness to limit coverage, a judge should have sua sponte authority to limit coverage of a witness' testimony. The members agreed, and made the following change:

(C) A judge on his or her own motion or upon request of a witness, ~~or may grant an objection of a particular witness to coverage of that witness' testimony,~~ and may prohibit coverage of the testimony of that witness upon a determination that coverage would have a substantial adverse impact upon that witness or his or her testimony.

The members further discussed whether the “substantial adverse impact” provision in paragraph (d)(2)(C) created an additional factor that a judge should consider under subsection (d)(1). The members felt that the “substantial adverse impact” language was specifically and only applicable

to paragraph (d)(2)(C). To make that clear, the members agreed to add a new clause to the introductory sentence of subsection (d)(2), as follows:

(2) *Limitation of coverage:* A judge may allow coverage as requested, or may impose the following limitations on coverage after making specific, on-the-record findings based on the factors in subsection (d)(1), or based on paragraph (C) below:...

Finally, the members thought that a reference to “a criminal or a civil proceeding” in paragraph (d)(2)(B) was superfluous, and the reference was deleted.

Rule 122(e) and Rule 122(f): While discussing equipment, members made comments about how jurors are distracted by sound and by movement in the courtroom. Still cameras in particular may produce clicking sounds when the shutter opens and closes. The members agreed that these sections should emphasize that the manner of coverage, as set forth in section (e), and equipment, which is described under section (f), should not “disrupt” the proceedings. The members expressed that emphasis with these two revisions:

- In Rule 122(e): All persons and affiliated individuals engaged in the coverage must avoid conduct or dress that may disrupt or detract from the dignity of the proceeding.
- In Rule 122(f): Microphones, cameras, and other equipment used for coverage must be as unobtrusive as recording devices in general use in the community where the courtroom is located, and must not produce distracting sounds or otherwise disrupt the proceeding.

The members made no other changes to sections (e) or (f), or to sections (g) or (j).

Rule 122(h): Staff deleted the word “journalist” from this section on personal audio recorders because the provision allows for the use of a personal audio recorder by “a person,” which axiomatically includes “a journalist.” None of the members objected to this deletion.

Rule 122(k): The members discussed two new prohibitions in Rule 122(k). Staff included these proposed provisions following review of a “media information packet” prepared by Judge John Leonardo in a Pima County capital case.

One of the new provisions, subsection (k)(1), provides that “a person may use a recording device in the courtroom only when the judge is on the bench, and use of a recording device must terminate when the judge leaves the bench.” The members had no objection to adding this new provision.

The other provision, subsection (k)(4) stated that a person could not use a camera to take readable images of documents on counsel tables. The members raised a number of issues concerning this proposed language. Does the provision include all documents on counsel table, or only confidential ones? Would the provision apply to electronic information on counsel’s computer? Would it apply to counsel’s documents on a podium? Should the provision also

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apply to jurors' notes? Because some courts now allow a second camera in the front of the courtroom, should this prohibition also apply to what is on the judge's bench and monitor? Should it apply to what is on the desks used by court staff? One member noted that a person would not need a telephoto lens to take a readable picture of a document, but that a lens of reasonable quality could capture an image that a person could enhance to make the document legible. Cameras and lenses will improve over time and capturing a readable image will become even more feasible. One member proposed that the provision should only prohibit a person from taking an image of a confidential document, one that has protected information, or one that is under seal. One member wanted the provision to allow a person to take pictures of any document that has been marked for identification; another member thought that the provision should allow taking images only of documents that were admitted into evidence. The members discussed various versions of the provision, but were unable to reach any consensus. The Chair advised that he and staff would work on revised language, and Mr. Bodney also volunteered to do so, and staff will circulate further revisions to the members.

This concluded the discussion of revisions to Rule 122, and the members then proceeded to Rule 122.1.

Rule 122.1: Staff described changes to sections (a) and (b) of Rule 122.1. Staff noted an inconsistency between the previous Rule 122(k)(3) ["a person whose request under this rule has been granted may not photograph...locations in a courthouse where a court proceeding is not being conducted..."] and Rule 122.1 (c), which would allow anyone to record in areas outside the courtroom. This inconsistency was resolved by deleting former Rule 122(k)(3) from the draft. The members accepted those changes.

Rule 122.1(c): Rule 122.1(c) in the prior version began by advising the reader of restrictions on recording in the courthouse, but it omitted to state that the rule allowed photography and recording outside the courtroom. The members therefore agreed to change the first sentence of section (c) as follows:

~~The following restrictions apply to p~~Photography, audio recording, and video recording in a courthouse are permitted, but the following restrictions apply:...

The members also agreed that naming specific categories of individuals in section (c)(2) was unnecessary. They believed that no individual should be the subject of a recording or a photograph taken without the individual's express consent. Therefore, the members changed the first sentence in this subsection to state:

(2) *Outside a courtroom:* In areas of a courthouse other than courtrooms, no one may photograph or record an individual, ~~including a judge, a juror, a witness, a victim, a law enforcement officer, an officer of the court, or court staff~~ without that person's individual's express consent. A violation of this section may be punished as contempt.

In subsection (c)(3), the members agreed to insert the word “reasonable” into the provision to convey its philosophy concerning blanket prohibitions of camera use, as follows:

By local administrative order, a court may adopt further reasonable limits....

Rule 122.1(d): The members reaffirmed a sentence in the previous version of Rule 122.1(c) that required jurors to turn off their portable electronic devices while in the courtroom or while in the jury room during deliberations, and not merely silence the devices. In reaching this conclusion, the members agreed that jurors should focus on court proceedings and jury deliberations by giving them their undivided attention. The members further concurred with a deletion of a provision in the previous version that would have required the court to provide a phone number for emergency messages to jurors. The members also agreed to add the following sentence in subsection (d)(1):

Jurors may use their devices for allowable purposes during breaks.

Rule 122.1(e): Staff noted that the version of Rule 122.1(e) included with R-13-0013 inadvertently allowed a judge to “prohibit” activity under this section. The members had agreed at the November 7 meeting that the rule should allow a judge to “terminate” activity. This remained the view of the members, and staff changed the word to “terminate,” as the members had previously agreed.

This concluded the members’ discussions concerning changes to Rule 122.1.

3. R-13-0022: Staff reviewed a proposed change, consistent with comments from the State Bar, which revised the following provision in the respective civil and criminal rules concerning the jurors’ oath:

...follow the court’s instructions, including the admonition....

The members agreed with this change. The members specifically agreed with substituting the word “follow” for the previously used word “comply” to further simplify the language of the juror oath.

4. Next steps: The Chair noted these dates:

May 8 is the deadline for filing amended rule petitions in R-13-0012 and R-13-0013

June 5 is the date that comments to the amended petitions are due

July 3 is Petitioner’s deadline for filing replies to comments on its amended petitions

Although staff will circulate drafts of today’s rule revisions to the members prior to the May 8 deadline, the Committee will not meet before then. The Chair therefore requested authority to draft the amended petitions and finalize the revised rules.

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Motion: A member moved to give the Chair authority to draft amended petitions in R-13-0012 and R-13-0013, and to finalize the proposed rules that are included with those petitions. The motion received a second and it passed unanimously. **Wireless 13-002**

The Chair advised the members that he would set another meeting during the week of June 10 or June 17, following the close of the second comment period, and he requested members to notify staff concerning dates that they would be unavailable for a meeting during those weeks.

5. Call to the Public; Adjourn: There was no response to a call to the public. The meeting adjourned at 1:45 p.m.